91-638

Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

Maribel Santos

Petitioner

v.

D. O. Rodriguez and City of Dallas

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER A POLICE OFFICER'S FAILURE TO ARREST AN INTOXICATED PERSON SUBJECTS HIM TO LIABILITY FOR THIRD PARTY ACTIONS THAT RESULT IN DAMAGES TO THE INTOXICATED PERSON.

2. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, IN ITS AFFIRMATION OF THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS IN MARIBEL SANTOS v. D.O. RODRIGUEZ AND THE CITY OF DALLAS, ERRED IN APPLYING DESHANEY v. WINNEBAGO COUNTY DEPT. OF SOCIAL SERVS., 489 U.S. 189 (1989) AND MCKEE V. CITY OF ROCKWALL, TEX., 877 F 2d 409 (5TH CIR. 1989) AS APPROPRIATE PRECEDENTS.

PARTIES

MARIBEL SANTOS, Petitioner
D. O. RODRIGUEZ, Respondent
THE CITY OF DALLAS, Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

MARIBEL SANTOS,

PETITIONER

V.

D.O. RODRIGUEZ and THE CITY OF DALLAS

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Maribel Santos petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals was issued on July 10, 1991, affirming the judgment of the District Court. (Appendix A). The judgment of the District Court was issued on September 4, 1990, granting Respondent's motion to dismiss under Fed. R. Civ. P. 12(b)(6). (Appendix B).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U. S. C. § 1331 and 28 U. S. C. § 1343 (1)-(4).

APPLICABLE FEDERAL QUESTION

42 U.S.C. § 1983 applies.

STATEMENT

Petitioner Maribel Santos filed her original complaint as a civil action in the Northern District of Texas seeking damages suffered by Petitioner caused by Respondent's violation of Petitioner's civil rights under 42 U.S.C. § 1983. The District Court issued its judgment on September 4, 1991, granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6). (Appendix B)

Petitioner appealed to the Fifth Circuit Court of Appeals and the judgment of the District Court was affirmed on July 10, 1991. (Appendix A)

REASONS FOR GRANTING THE WRIT

THE FUNDAMENTAL ISSUE IN MARIBEL SANTOS v. D. O. RODRIGUEZ AND THE CITY OF DALLAS IS CLEARLY DISTINGUISHABLE FROM THOSE PRESENTED BY DESHANEY v. WINNEBAGO COUNTY DEPT. OF SOCIAL SERVS. AND MCKEE v. CITY OF ROCKWALL; THUS THE USE OF THESE CASES AS CONTROLLING PRECEDENT IS IN ERROR.

Because the questions presented are factually inextricable from one another, discussion of them will be integrated.The essence of this Court's holding in DeShaney is found in the statement that the purpose of the Due Process clause of the fourteenth amendment is "to protect the people from the State, not to ensure that the State protect[s] them from each other," 109 S.Ct. 998, 10003 (1989).

More specifically, the decision also states that:

> While the State may have been aware of the dangers that [Joshua DeShaney] faced, it played no part in their creation, nor did it do anything to render him more vulnerable to them. **Under the circumstances** (emphasis added), the Due Process Clause did not impose upon the State an affirmative duty to provide petitioner with adequate protection. 109 S.Ct. 998, 1006 (1989)

Petitioner Santos would show that although the injury of which she complains was immediately caused by a private actor, it was proximately caused by the inaction of a State agent under circumstances in which the State had imposed a clear limitation upon her freedom to act on her own behalf and had thus imposed upon its agent an equally clear duty to act.

On the night of November 8, 1986, Maribel Santos was beaten, raped, and robbed in a wooded area adjacent to the

parking lot of a Dallas nightclub. In the course of this attack, her clothing was torn and soiled and her shoes and handbag were taken. Upon regaining consciousness, she approached Officer D. O. Rodriguez, who, in uniform, was working as a security guard at the by-then-closed nightclub; telling him that she had been raped, she asked for help. Officer Rodriguez, according to his own statements, perceived Ms. Santos as a highly intoxicated person. Despite Police Department regulations to the contrary, he took no action, merely telling Ms. Santos to go home. Unable to obtain help from people inside the club, Ms. Santos started to leave the grounds. Before she succeeded, she was raped a second time.

An investigation conducted by the Internal Affairs Division of the City of Dallas Police Department concluded that:

As a result of Corporal Rodriguez' actions, he should be held accountable for violating the following Rules and Regulations.

DALLAS POLICE DEPARTMENT--CODE OF CONDUCT
CHAPTER IV--PROFESSIONAL CONDUCT AND PERSONAL BEARING

4.2 Officers shall not engage in any conduct which constitutes conduct unbecoming an officer or neglect of duty.

PATROL STANDARD OPERATING PROCEDURES
INTOXICATED PERSONS

Persons found to be intoxicated are a danger to themselves because of the possibility that they may become injured by an automobile, injured by some other person, or that they may injure themselves. Also, a person who is intoxicated is often the victim of a criminal offense, i.e., robbery, assault, etc. Additionally, these persons are in violation of the Texas Penal Code, therefore, ALL persons found to be intoxicate and in violation of the Texas Penal Code will be processed in the following manner:

1. Officers may release the intoxicated person to a responsible adult capable of and willing to assume the responsibility of the subject's custody.The officer should properly identify the responsible third person and assure himself that this person will properly assist the intoxicated person.

2. If an intoxicated person is arrested near his residence, the arresting officer may release the subject to someone at the residence if they are willing to accept the subject. If the intoxicated person demonstrates any indication that he will become involved in a disturbance, he will not he released.

3. Should all efforts to place the intoxicated person in the custody of a responsible agency or individual fail, and there are no unrelated charges, and the intoxicated person is conscious and uninjured, they will be taken to DETOX.

4. Prisoners arrested for "Public Intox :ation" who are unconscious, semi-conscious, and/or seriously injured will be taken to Parkland Hospital by Dallas Fire Department Ambulance. Those who have minor injuries will be taken directly to Sterrett Center to be treated by the on-duty medical attendant.The on-duty medical attendant shall determine whether the prisoner will be taken to PMH [Parkland Memorial Hospital], the DETOX Center, or remain in jail for observation or follow-up treatment.

The IAD investigator concluded that "Corporal Rodriguez neglected his duty as a law enforcement officer by not taking into custody Ms. Santos, an intoxicated person," and that this neglect of duty resulted in Ms. Santos' being sexually assaulted.

The above-cited procedures clearly establish both a State-imposed limitation on the freedom of action of a person whom an officer perceives to be intoxicated and a duty to act upon the officer; such discretion

as the procedures allow does not include the option of inaction.

Petitioner contends that the State, in limiting her freedom of action through the Rules and Regulations cited, placed her in a category of persons owed an affirmative duty by representatives of the State. Petitioner further contends that though Officer Rodriguez had no part in creating the original danger and resulting harm, his failure to act in the circumstances both created a risk of further harm and rendered her more vulnerable to that harm. Petitioner therefore contends that the standard set out in DeShaney is inapplicable in the instant case and that its application by the United States Court of Appeals for the Fifth Circuit was error.

Petitioner would also show that the fundamental issues in the instant case and in McKee v. City of Rockwall are quite distinguishable and that the Fifth Circuit's application of McKee was therefore as erroneous as its application of DeShaney.
In McKee, the issue was one of police discretion to arrest or not to arrest in

circumstances that were no more than "suspicious." Following DeShaney, the court observes that:

> There is no constitutional violation when the "most that can be said of state functionaries is that they stood by and did nothing when suspicious circumstances dictated a more active role." 109 S.Ct. at 1007.McKee v. City of Rockwall, 877 F 2d 409, 413 (5th Cir., 1989).

And in holding that police discretion includes the choice to refrain from making an arrest in such circumstances, the court, citing to City of Los Angeles v.Heller, 475 U.S. 796, 106 S. Ct. 1571, 1573, 89 L.Ed.2d 806 (1986), states that:

> If indeed the police could reasonably have believed that they lacked grounds to make an arrest, their refusal to do so cannot be unconstitutional. McKee v. City of Rockwall, 877 F 2d 409, 414 (5th Cir.1989).

The unmistakable implicit corollary of the first of these statements is that when State functionaries fail to act in circumstances that are more than merely "suspicious," there may be a constitutional violation. The equally unmistakable implicit corollary to the second is that if police officers could not reasonably have believed that they lacked grounds to make an arrest, their refusal to do so could have been unconstitutional. By his own admission, Officer Rodriguez has made it clear that he did not merely suspect that Ms. Santos was intoxicated; he was quite certain that she was.

Given this certitude, he could have had no reasonable belief that he lacked grounds to arrest Ms. Santos. He perceived her to be intoxicated and he acted in accordance with none of the relevant procedures, all of which he knew or had reason to know. Further, he knew or had reason to know that he was required to follow at least one of the outlined procedures before leaving . Officer Rodriguez' inaction was not a permissible exercise of discretion; it was, as

his department's own investigation confirmed, unconscionable negligence--negligence which, because of its context of State-imposed limitation on an individual's liberty, rises to the level of a constitutional violation.

CONCLUSION

Petitioner moves the Court to grant the Writ of Certiorari and to reverse and remand the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 90-1888
Summary

MARIBEL SANTOS,
Plaintiff-Appellant,

v.

D. O. RODRIGURZ, and
THE CITY OF DALLAS,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas
(CA 3 88 1748 T)

Before KING, GARWOOD and DUHE, Circuit Judges.

PER CURIAM: *

Maribel Santos (Santos), plaintiff-appellant, appeals the districts court's Fed. R. Civ. P. 12(b)(6) dismissal of her civil rights suit. Santos alleged that appellees D. O. Rodriguez (Rodriguez) and the City of Dallas, Texas deprived her of her constitutional rights while acting under color of state law. For the reasons set forth below, we affirm.

Santos alleges that on November 8, 1986, she was beaten and raped by three men in a wooded area outside The Ritz, a Dallas nightclub. While Santos's friend went to get her truck, three men dragged Santos alongside the nightclub building. The men dragged her through a hole in the fence bordering The Ritz and a nearby motel. The men knocked Santos unconscious and, when she came to, she crawled through the fence onto the grounds of the motel. Santos further alleges that, bruised and with torn clothing, she approached Dallas police officer Rodriguez

and told him that she had been beaten and raped. Rodriguez allegedly told Santos that she was drunk and should go home. Santos then hid behind a nearby automobile. One of her assailants then dragged her back through the fence and raped her again.

Santos filed suit under, inter alia, 42 U.S.C. § 1983 against Rodriguez and the City of Dallas for deprivation of her civil rights. Santos claimed that Rodriguez violated her civil rights by failing to protect her from her assailant. She claimed that the police department and the city had failed to properly train, supervise, and discipline law enforcement personnel; failed to promulgate effective policies; and allowed its policies to be abused. Santos also asserted three state-law claims. The defendants denied Santos's allegations and raised a number of affirmative defenses.

The defendants filed a motion to dismiss Santos's claim for failure to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6). In the motion to dismiss, Rodriguez raised the defense of qualified immunity. In her response to the

motion to dismiss, Santos for the first time asserted that Rodriguez had failed to protect her because she is Hispanic and had thus violated her right to equal protection of the laws. The district court did not explicitly decide whether Santos had amended her complaint by making the equal protection assertion. It did, however, state in its order dismissing Santos's claim that "Plaintiff contends that Rodriguez ignored her plea for assistance in violation of Plaintiff's constitutional rights because Plaintiff is Hispanic." The district court appears to have treated Santos's response to the defendants' motion to dismiss as a constructive motion to amend her complaint, which it granted. See Sherman v. Hallbauer, 455 F.2d 1236, 1242 (5th Cir. 1972). Santos attached to her response copies of disciplinary reports about a complaint she filed with the police department about Rodriguez's actions.

The defendants then filed a reply to Santos's response. The defendants asserted that Rodriguez was under no constitutional duty to protect Santos. They also asserted

that Santos did not have evidence sufficient to establish an equal protection violation. The defendants attached to their reply copies of Santos's deposition and her answers to written interrogatories.

The district court granted the defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss the federal law claims, and dismissed Santos's state law claims without prejudice. Santos subsequently filed a motion for a new trial, which the district court denied. Santos filed a timely notice of appeal.

II.

The district court dismissed this case under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. However, both parties presented summary judgment evidence, and here treat the appeal as if the district court had granted summary judgment for the defendants.[1] Accordingly, we will review

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[1] The parties may have requested that we analyze this case under Fed. R. Civ. P. 56 because the district court,in its Fed. R. Civ. P. 12(b)(6) dismissal, wrote that it 'considered Defendants' motion for summary judgment and Plaintiff's response thereto [and] is of the opinion that the motion shojld

the record under a summary judgment analysis. "On review of a grant of summary judgment, we apply the same substantive standard as the district court. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Federal Deposit Ins. Corp. v. International Property Management, 929 F.2d 1033, 1034 (5th Cir. 1991); Fed. R. Civ. P. 56.

On appeal, Santos argues that there are genuine issues of material fact as to whether Rodriguez violated the policies of the Dallas Police Department; whether Rodriguez's conduct "shocked the conscience" and therefore was a violation of due process;

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be granted." We further note that Santos, in her appellate brief, states that the court "had essentially all of the matters outside of the pleadings which had been presented [to] and not excluded by the court," and that the court did not respond to Santos's request to revise its order to clarify the fact that the order was a Fed. R. Civ. P. 12(b)(6) dismissal. Santos's brief implies that she considered the district court's order as one for summary judgment due to the presentation of summary judgment evidence and the fact that the district court did not respond to her request to revise its order. Moreover, by urging us to consider her appeal under Rule 56, Santos implies that she had adequate notice to present summary judgment evidence.

and whether Rodriguez violated Santos's right to equal protection. We will address each argument in turn.

A.

Santos's first argument is that Rodriguez's conduct violated stated policies of the Dallas police department, and, therefore, violated her constitutional rights. Santos correctly argues that there are sufficient facts to suggest that Rodriguez's actions violated departmental policy. In fact, the police department's own investigation concluded that "Rodriguez neglected his duty as a law enforcement officer by not taking into custody Ms. Santos, an intoxicated person. As a result, Ms. Santos was allegedly sexually assaulted."

The Supreme Court, in DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189 (1989), stated that 'nothing in the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The clause is phrased as a limitation on the State's power to act, not as

a guarantee of certain minimal levels of safety and security." Id. at 195. The DeShaney Court went on to state that the purpose of the due process clause "was to protect the people from the State, not to ensure that the State protect them from each other." Id. at 196.

This court, in McKee v. City of Rockwall, Tex., stated that "[t] here is no constitutional violation when the 'most that can be said of ...state functionaries ... is that they stood by and did nothing when suspicious circumstances dictated a more active role.' " 877 F.2d 409, 413 (5th Cir. 1989)(quoting DeShaney, 489 U.S. at 203), cert. denied, ___ U.S. ___, 110 S. Ct. 727 (1990). Santos, in her first argument, seeks damages for Rodriguez's failure to arrest her or take her into custody for being publicly intoxicated. While a Dallas police investigation found that Rodriguez neglected his duty as a police officer by not taking Santos into custody, his inaction, under DeShaney and McKee, does not rise to a constitutional violation.

B.

Santos's second argument is that Rodriguez's conduct "shocks the conscience" and therefore rises to the level of a constitutional violation. DeShaney and McKee stand for the proposition that there is no due process violation where state functionaries stand by and do nothing when suspicious circumstances dictate a more active role. See McKee, 877 F.2d at 413. Santos's argument that Rodriguez's inaction "shocks the conscience" does not overcome our holding in McKee that such inaction is not a due process violation. Thus her argument fails.

C.

Santos's final argument is that Rodriguez and the City of Dallas violated her constitutional right to equal protection by selectively denying her protection because she is Hispanic. The Supreme Court, in DeShaney, noted that '[t]he State may not, of course, deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." DeShaney, 489 U.S. at 197, n.3. The court in McKee, which involved an

equal protection claim, said the "[b]ecause McKee's complaint sounds in Equal Protection, rather than Due Process, it is not directly barred by the holding in DeShaney." McKee. 877 F.2d at 413. The McKee court cautioned, however, that the footnote in DeShaney stating that a plaintiff might have a valid equal protection claim for the selective denial of protective services "does not permit plaintiffs to circumvent the rule of DeShaney by committing every Due Process claim into an Equal Protection claim via an allegation that state officers exercised their discretion to act in one incident but not in another." McKee, 877 F.2d at 413.

In McKee, a woman brought suit against individual police officers and the Rockwall police department under § 1983 for refusing to arrest her boyfriend. She alleged that the nonarrest was the result of gender discrimination, and produced some summary judgment evidence to support her position. The district court denied the defendant's motion for summary judgment, and this court reversed, dismissing the

claims against the police officers. This court held that McKee produced insufficient evidence to support her equal protection claim.[2]

In the instant case, Santos has produced substantially less evidence than McKee did. Santos alleged in her response to defendants' motion to dismiss that if she "had been white, Officer Rodriguez would have believed she had been raped and would have protected her, preventing Plaintiff from being raped again by another assailant." Santos's only summary judgment evidence supporting her allegations of equal protection violations by Rodriguez and the City of Dallas is that Rodriguez told her "go home, you're drunk" when she requested aid.[3] This evidence, especially in

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[2] McKee's evidence consisted of an affidavit by her mother stating that she called the Chief of Police, who said that the police did not like to make arrests in domestic assault cases because the women involved either wouldn't file charges or would drop them prior to trial. McKee also produced statistical evidence purporting to show that the Rockwall police make fewer arrests in domestic assault situations.

[3] The defendants asked Santos, in a written interrogatory, to specifically state each and every fact upon which she bases her allegation that Rodriguez deprived her of her constitutional rights. She answered:

light of McKee, is insufficient to raise a genuine issue of material fact that Rodriguez selectively deprived Santos of protection due to the fact that she was Hispanic. Similarly, Santos fails to set forth any summary judgment evidence supporting her contention that the City of Dallas selectively denies protection to Hispanics in general. In fact, Santos testified in her deposition that she did not know how Dallas trained its officers, and does not know any other officers that Dallas failed to adequately train, instruct, supervise,

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On the night in question, Officer Rodriguez, contrary to the City of Dallas Police Department Requirement failed to render aid to Plaintiff and failed to place Plaintiff under arrest for public intoxication. Said failure to place Plaintiff under arrest was due to Officer Rodriguez' prejudice against what he perceived as being a drunk Mexican woman. Said failure as also due to Officer Rodriguez' desire not to be bothered with the [situation] since he was on an off duty job. Plaintiff bases all of theses allegations on the Officer's remarks to her when she requested aid. He said "Go home, you['re] drunk."

Officer Rodriguez was reckless in his failure to place Plaintiff under arrest if he believed her to be [publicly] intoxicated and considering the part of town, the physical appearance of Plaintiff.

Further, Plaintiff claims that the Officer, specifically refused to render aid when he informed him that she had been raped, but told her to go home, that she was drunk.

control, or discipline. Therefore, Santos's equal protection claim fails due to insufficient evidence.

III.

For the foregoing reasons, the district court's judgment is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

MARIBEL SANTOS,
Plaintiff

v.

D. O. RODRIGUEZ, Individually and as a police officer of the City of Dallas Police Department and THE CITY OF DALLAS,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

On December 8, 1989, Defendants filed their Motion to Dismiss. Plaintiff filed her response on January 16, 1990. Defendants filed their reply on February 21, 1990.

On July 27, 1990, Plaintiff brought this § 1983 action asserting that Defendants had deprived her of certain constitutional rights. Specifically, Plaintiff alleges that on November 6, 1986, Plaintiff was at a night club, The Ritz. On November 7, 1986, at approximately 2:00 am, Plaintiff alleges that she exited The Ritz with a girl friend. Plaintiff states that while she was waiting for her friend to get her truck, Plaintiff was dragged through a hole in the fence alongside The Ritz and was knocked unconscious. Plaintiff states that when she woke up, she discovered that her pants and underwear had been removed and that her body was bruised and in pain.

Thereafter, Plaintiff alleges that she approached Defendant Rodriguez, who was working as an authorized security guard at The Ritz, and told him that she had been assaulted and wanted assistance. Plaintiff alleges that Rodriguez failed to give her ay

assistance, but rather told Plaintiff to go home because she was drunk. Plaintiff next alleges that as she attempted to leave The Ritz another man came up to Plaintiff to offer his assistance and then he dragged Plaintiff back through the hole in the fence and raped her.

Plaintiff now brings this action against Defendant Rodriguez for failing to respond to her plea of assistance after her first alleged assault and alleges that his failure to provide such assistance lead to her being raped. Plaintiff contends that Rodriguez ignored her plea for assistance in violation of Plaintiff's constitutional rights because Plaintiff is Hispanic.

Defendants now move the Court to dismiss Plaintiff's complaint. In support of their position, Defendants contend that they cannot be held liable for the negligent failure to protect Plaintiff, that they did not violate any duty owed to Plaintiff, that Defendant Rodriguez is entitled to qualified immunity, and that the City of Dallas cannot be liable because no constitutional injury exists.

Plaintiff responds, without citing any authority in support of her position, that she has asserted a claim and that Defendant Rodriguez's behavior towards Plaintiff evidenced a callous indifference. Plaintiff insists that Rodriguez had a constitutional duty to investigate her claim that she had been assaulted and if Rodriguez had investigated her claim, Plaintiff would not have been in the parking lot so that he could be raped. In support of her position, Plaintiff asserts that Rodriguez violated a police department regulation and was reprimanded for it.

Defendants reply that Rodriguez was reprimanded for failing to take Plaintiff into custody if Rodriguez believed that Plaintiff was drunk, but not for failing to render aid to her when she reported that she had been assaulted.

The Court, having considered Defendants' motion for summary judgment and Plaintiff's response thereto, is of the opinion that the motion should be granted. In a similar case in which a police officer failed to arrest a subsequently injured

plaintiff, the Fifth Circuit held that no such duty to arrest befell the police officer and the court dismissed the plaintiff's § 1983 claim. McGee v. City of Rockwall, Texas, 877 F.2d 409 (5th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 727 (1990). As Plaintiff has failed to establish a constitutional injury has been committed, the City of Dallas cannot be liable for any constitutional violation. City of Los Angeles v. Heller, 475 U.S. 798 (1986).

The Court, having considered Defendants motion to dismiss and Plaintiff's response thereto, is of the opinion that Plaintiff's complaint fails to support a cause of action pursuant to 42 U.S.C. § 1983. As the Court finds that Plaintiff's § 1983 action should be dismissed, the Court is of the opinion that it should dismiss Plaintiff's pendent state law claims. Daniels v. All Steel Equipment, Inc., 590 F.2d 111 (5th Cir. 1979).

It is therefore **ORDERED** that Defendants' motion to dismiss is granted and that Plaintiff's complaint as to 42 U.S.C. § 1983 is dismissed with prejudice.

It is **FURTHER ORDERED** that Plaintiff's complaint as to pendent state law causes of action is dismissed without prejudice.

Signed the 4th day of September, 1990.

ROBERT B. MALONEY
UNITED STATES
DISTRICT JUDGE

AFFIDAVIT OF COUNSEL AS TO MAILING PETITION OF WRIT OF CERTIORARI

I, Frank P. Hernandez, Counsel for Maribel Santos, Petitioner, swear that the foregoing Petition was depositied in the United States mail with the proper postage, prepaid, on October ___, 1991.

_____
Frank P. Hernandez

STATE OF TEXAS §
COUNTY OF DALLAS §

SWORN TO AND SUBSCRIBED before me, a notary public, by the said Frank P. Hernandez, on this the ___day of October 1991, to certify which witness my hand and seal.

_____

Notary Public in and for
The State of Texas

My Commission Expires:

_____

CERTIFICATE OF SERVICE

I hereby certify that a correct copy of this Petition was mailed to Thomas P. Brandt, Assistant City Attorney, City Hall 7BN, 1500 Marilla St., Dallas, Texas, 75201, attorney for Respondents on this the ___day of October, 1991.

_____

Frank P. Hernandez

Supreme Court, U.S.
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(2)

No. 91-638

In The

Supreme Court of the United States

October Term, 1991

MARIBEL SANTOS,

Petitioner,

vs.

D. O. RODRIGUEZ AND CITY OF DALLAS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Constitution imposes upon a police officer an affirmative obligation to protect people from the criminal acts of others.

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No. 91-638

In The

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MARIBEL SANTOS,

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vs.

D. O. RODRIGUEZ AND CITY OF DALLAS,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) and the memorandum order and judgment of the district court (Pet. App. B) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1991. The petition for a writ of certiorari was filed on October 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On Friday night November 7, 1986, Petitioner Maribel Santos decided to go dancing at "The Ritz," a nightclub in Dallas, Texas. Santos stayed at "The Ritz" until early Saturday morning November 8, 1986. By the time she was ready to leave, she was intoxicated. Santos claims that, as she was leaving, she was attacked by three men. She claims that the three men took her to a wooded area nearby where they beat her, raped her and knocked her unconscious. Santos claims that, after a short time, she regained consciousness, found a Dallas police officer and reported the rape to him. Santos claims that the officer, Respondent D.O. Rodriguez, told her that she was drunk and advised her to go home. Santos, apparently discouraged by the officer's alleged statements, decided to leave the officer and seek help elsewhere. Santos claims she sought help by pounding on the door of the "The Ritz." The answer from inside came back "Sorry, we're closed." Santos claims that, at this point, she was scared, angry, disappointed and in shock. She claims that she crouched behind an automobile to "pull herself together." While she was behind the automobile, Santos claims that three men approached her and asked if she needed help. Distrustful, she asked them to leave. At the same time, a fourth man approached her and told the other three men "It's okay, I already got her some help." The three men left Santos alone with the fourth man. Santos claims that this fourth man grabbed her, took her to a secluded area and proceeded to beat her and rape her. After this second beating and rape, Santos made her way to a nearby motel and telephoned for help.

Santos blames Officer Rodriguez for the second rape. Santos claims that Officer Rodriguez should have arrested her for public intoxication. Santos claims that, had she been arrested, she would have never been raped a second time. Santos alleges that Officer Rodriguez negligently failed to protect her from the criminal acts of another. Santos sued Rodriguez under 42 U.S.C. §1983. The district court granted Officer Rodriguez's motion for summary judgment and the court of appeals affirmed the district court's decision.

ARGUMENT

The petition for writ of certiorari should be denied for the following reasons: (1) the question before the Court has already been decided by the Court's previous decisions; (2) the lower court's decision reflects sound public policy; and (3) no conflict exists among the circuits.

I. The Only Question Before the Court Has Already Been Decided By the Court's Previous Decision.

The question before this Court is whether the Constitution imposes upon a police officer an affirmative obligation to protect people from the criminal acts of others. This Court answered that question recently in *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189 (1989). In *DeShaney*, this court held that nothing in the language of the Due Process Clause of the Fourteenth Amendment requires the state to protect the life, liberty, and property of its citizens against invasion by private actors. *Id.*, at 195. This Court

has recently decided the issue involved in the instant case and, therefore, there is no need to grant certiorari.

II. The Fifth Circuit's Decision Reflects Sound Public Policy.

The lower court implicitly held that the Constitution does not require a police officer to arrest a person because the person has committed an offense or because the person, if arrested, would be protected from the criminal acts of others.

It is sound public policy to allow officers discretion in making arrests. To hold otherwise is to ignore the realities of limited law enforcement resources and to lose the benefits of officers' experience and good judgment. It is also sound public policy that police officers not be charged with an affirmative obligation to protect people from the criminal acts of others. To hold otherwise is to make police officers the guarantors of the safety of all citizens. As guarantors, police officers would be forced to act as insurance companies, paying out money to anyone harmed by criminal acts. In such a world, police officers would be inclined, if not required, to place everyone into protective custody. Certiorari should be denied in this case because the decision of the lower court reflects sound public policy.

III. No Conflict Exists Among the Circuits.

Petitioner has failed to allege that any conflict exists among the circuits on the issue of a state actor's liability for failure to protect a citizen from criminal acts. The

petition for writ of certiorari should be denied because there is no conflict among the circuits on the issue before this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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